claim of defendant for allged deficit, and notwithstanding the fact that the railway operating revenues of said railroad during said period of private operation exceeded the railway operating expenses, taxes, and net debits from equipment and joint facility rents, said Commission, conformably to its ruling of February 9, 1922, aforesaid, decided that in contemplation of said Transportation Act, the defendant, during said period of private control, had sustained a deficit of $487,116.31, and thereupon certified to the Treasurer of the United States that defendant was entitled to receive said sum from the United States Treasury and further certified that there was nothing due from defendant to the President (as operator of the transportation systems under Federal control) on account of traffic balances or other indebtedness.

7. That on March 21, 1925, the certificate of the Commission (B–300) was transmitted by the Treasury to the Comptroller-General [3] of the United States, with recommendation that warrant be issued in favor of the defendant for the last-mentioned sum, payable from the appropriation "Reimbursement to Carriers of Deficits during Federal Control."

8. That pursuant to the certificate of the Comptroller-General for settlement of said claim, the Treasury issued a warrant in said sum which was transmitted to the Treasurer of the United States and by him paid to the defendant in full on or about March 26, 1925.

9. That the construction placed by the Interstate Commerce Commission upon the word "deficit" as set forth in paragraph 4 hereof was an erroneous and unwarranted construction and not in harmony with the accepted use of said word or of its use as found elsewhere in said Transportation Act, in that by said construction it was necessary to hold that defendant's said railroad, between September 28, 1918, and February 29, 1920, inclusive, sustained a deficit in net railway operating income, whereas, in fact, its railway operating revenues during said period, exceeded its railway operating expenses, taxes, and net debits from equipment and joint facility rents by the sum of $239,525.13.

10. That thereafter, and on October 17, 1925, said Interstate Commerce Commission duly overruled its general order of February 9, 1922, aforesaid, by which the word "deficit" was construed as described in paragraph 4 hereof, and held the meaning of said word to be the excess of operating expenses over railway operating revenues computed as provided, in said Section 204, incurred by a carrier for that portion (as a whole) of the period of Federal control during which it operated its own railroad, and without reference to its net earnings during the test period or any other time. (Deficit Status of Bingham & Garfield Railway Company, 99 I. C. C. 724, [4] Finance Docket No. 2500).

11. That the meaning last given to the word "deficit" by said Commission, as set forth in the

next preceding paragraph hereof, is its true meaning, and conforms to its accepted usage and is in harmony with the use thereof made elsewhere in said Transportation Act.

12. That after issuing to defendant the certificate above mentioned, and on January 8, 1927, said Commission issued an order reopening the proceeding for the adjustment of defendant's said claim for deficit, and notified defendant to show cause why said certificate of the Commission should not be revoked and the said claim canceled. A hearing on said order was duly held before the Interstate Commerce Commission on March 1, 1927, at which the defendant was represented by counsel and objected to the reopening of said proceeding.

13. That after examining briefs filed at said last-mentioned hearing, and being fully advised in the premises, the Interstate Commerce Commission, on March 7, 1927, by order duly made and entered upon its records, duly revoked and canceled the certificate issued by it to the defendant on March 20, 1925, as aforesaid, and dismissed said proceeding; of all of which defendant was given due and timely notice.

14. That thereafter and on or about June 8, 1928, demand was made upon defendant by the Under Secretary of the Treasury of the United States for the repayment of said sum of $487,116.31; but that payment of said sum, or any part thereof, has been and still is wholly refused by defendant.

WHEREFORE plaintiff prays judgment against the defendant for the sum of $487,116.31, together with lawful interest thereon from and after June 8, 1928, and for the costs of this action.

WELLINGTON D. RANKIN,
United States Attorney for the District of Montana. [5]

United States of America,
District of Montana,—ss.

Wellington D. Rankin, being duly sworn, deposes and says: That he is the United States Attorney for the District of Montana; that he has read and knows the contents of the foregoing complaint, and that the same are true according to the best of his knowledge, information and belief.

WELLINGTON D. RANKIN.

Subscribed and sworn to before me this 23d day of August, 1929.

[Notarial Seal] ARTHUR P. ACHER,
Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires June 30, 1930.

Filed August 23, 1929.

THEREAFTER, on the 6th day of September, 1929, the demurrer of the defendant to the complaint of the plaintiff was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

DEMURRER.

Comes now the defendant, Butte, Anaconda & Pacific Railway Company, a corporation, and demurs to the complaint of plaintiff herein on the following ground and for the following reasons:

I.

That said complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this demurring defendant.

L. O. EVANS,
WARREN NICHOLS,
D. M. KELLY, and
JOHN A. GROENEVELD,
Attorneys for Defendant. [6]

Service of all subsequent papers, except writs and process, may be upon attorneys for the defendant at their address, 616 Hennessy Building, Butte, Silver Bow County, Montana.

State of Montana,
County of Silver Bow,—ss.

L. O. Evans, being first duly sworn, on oath deposes and says: That he is one of the attorneys of record for the defendant in the above-entitled cause, and that the above and foregoing demurrer has not been interposed for delay, and he certifies that in his judgment the same is well founded in law.

L. O. EVANS.

Subscribed and sworn to before me this 6th day of September, A. D. 1929.

[Notarial Seal] J. A. LIVINGSTON, Jr.
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires Feb. 26th, 1932.

Service of the foregoing demurrer acknowledged, and copy received, this 12th day of September, 1929.

WELLINGTON D. RANKIN,
United States Attorney for the District of Montana.

Filed September 13, 1929.

THEREAFTER, on the 26th day of February, 1930, the order of the above-entitled court overruling the defendant's demurrer to the plaintiff's complaint was entered in the minutes of the court, in the words and figures following, to wit:

(Title of Court and Cause.)

ORDER OVERRULING DEMURRER TO COMPLAINT.

This cause came on regularly this day for judgment and decision of the court, said cause having heretofore been duly argued and [7] submitted on defendant's demurrer to the complaint herein. Thereupon, after due consideration court ordered

that said demurrer be and is overruled. Memo decision filed.

C. R. GARLOW,
Clerk.
By L. R. Polglase,
Deputy.

Entered February 26, 1930.

THEREAFTER, on the 26th day of February, 1930, the decision of the above-entitled court, by written opinion, overruling defendant's demurrer to plaintiff's complaint was duly filed herein, in the words and figures, following, to wit:

(Title of Court and Cause.)

DECISION OVERRULING DEMURRER TO COMPLAINT.

Upon this demurrer to the complaint to recover money alleged to have been paid by mistake, the issues are the proper construction of the phrase, "which sustained a deficit in its railway operating income," in Par. A, Sec. 204, T. 49, Section 73, U. S. C. A., the Transportation Act of 1920, and the effect of the Interstate Commerce Commission's decisions *infra*. It appears that at all material times defendant operated a railroad as a common carrier, which during its period of Federal control connected with a railroad under such control.

In those halcyon days when "he kept us out of war," defendant's road earned a substantial net

railway operating income. Came an election won, entry into the war, Federal control and of defendant's road, release of it to defendant which operated it the remainder of the period of such control, and a net railway operating income but less than before control or during the "test period" in Par. a defined.

Followed the Transportation Act of 1920, the Interstate Commerce Commission's construction of the mooted phrase aforesaid to import [8] a red ink balance, self-reversal to import mere decrease of income whether or not in the red, defendant's claim for reimbursement on account of its decrease aforesaid, the Commission's certification of it in amount $487,116.31, payment by plaintiff, again the Commission's reversal of self to again construe said phrase to intend a red balance, its rehearing and rejection of defendant's claim, plaintiff's demand for reimbursement by defendant refused, and this action.

The Commission's decision aforesaid scanned, indicate changes in its personnel may operate much as in appellate courts.

From any decision herein, appeal is certain and justifies brevity.

The Federal Control Act guaranteed all roads controlled compensation equivalent to their average annual operating income during the three years ending June 30, 1917, the "test period" aforesaid. Any excess operating income vested in the United States. Roads not taken under control or from control released, shifted for themselves as before control,—entitled to all their income but no more,

be it more or less than the test period income. The Transportation Act terminating control, amongst other things guaranteed to roads under control an operating income for the ensuing six months equal to their compensation under control, plus certain sums for additions, betterments and extensions, by the carrier made; and to roads circumstanced as defendant's, an operating income equivalent to that of the test period, plus the like certain sums awarded the controlled carriers as aforesaid, any excess income to be paid to the United States. In these provisions for carriers like defendant's occurs the phrase about which revolves the case at bar. It also occurs repeatedly elsewhere in the Transportation Act. And it is conceded (even by defendant save in respect to Par. a) that always it imports a red ink [9] balance, not a mere decrease in operating income but income less than outlay. Evidently, the Transportation Act designed that the controlled roads should fare as well in the guaranty period as during control, and the roads like defendant's, as well as in the test period. To these latter roads the Act extended further benefits, to the extent that if any such carrier "sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal Control during which it operated its own railroad," the Interstate Commerce Commission "shall ascertain for every carrier" its "deficit in railway operating income, if any, and its railway operating income, if any," for every month of the carrier's operation during the period of Federal control, and the like derived from averaging the three corre-

sponding months of the test period; that to the carrier will be credited any difference between results for corresponding months which are to the advantage of the test period, and to the United States, any like differences to the advantage of the control period; and that to the extent that the sum of the former exceeds that of the latter, the Commission shall certify it to the Secretary of the Treasury, whose warrant therefor shall be paid to the carrier. See Par. b–g, Sec. 204, T. 49, U. S. C. A.

Thus Par. a defines a general class of roads which may be entitled to indemnity, and pars. b–f, the computations by which any particular road so entitled is identified and the amount of indemnity ascertained. The first is the grant, and principal, the last, is the means of identification of the grantee, and subsidiary. In its interpretation of "deficit in its railway operating income" in Par. a as importing mere decrease of income and not an excess of outlay over income or a red balance, the Interstate Commerce Commission recognized it was departing from the clear import of [10] the same term repeatedly elsewhere appearing in the Act. This it sought to justify by considerations of otherwise disparity, inequity, hardship, injustice and absurdity, and of history, object, committee reports, etc.

For this construction on like reasoning defendant contends.

The argument may demonstrate that in the particular roads to be indemnified Congress ought to

have included defendant's and its like, but it fails to persuade that Congress did.

It may be that the term in Par. a, "deficit in its railway operating income," is inaccurate to express the idea of outlay exceeding income or a red balance; but Congress having so used it some half-score other places in the Act, must be taken to have likewise used it in Par. a, no different intent clearly appearing. In the matter of grants of public property, any and all doubts are resolved against the grantees. Those who claim to be of the class of beneficiaries, must find their warrant in express language of the granting act, and not at all in strained, ingenious and unusual interpretations and inferences. Had Congress intended to include roads circumstanced as defendants, it could have plainly said so and did not. Moreover, to include the latter roads, the mooted term in Par. a is wholly unnecessary and superfluous. Omit it, and they are included. On the contrary Congress therein stipulated none shall enjoy the bounty conferred save those sustaining a "deficit"; and since its only concern and prime object was successful operation of roads, it provided that the deficit need appear only in "railway operating income" whether or *not was* a deficit in the income as a whole and which might include much from land grants, mines, investments and what not. Hence, the reason for the words descriptive of the deficit, whether or not inaccurate. They distinguish the one variety of income from the other, and are words of restriction. Without them, [11] the

word "deficit" would clearly import a red ink balance in the entire income; with them, it imports a red ink balance limited to part of the entire income, viz., the "railway operating income." And thus did Congress intend.

The House committee report on the Transportation Act is likewise persuasive, in that referring to "deficit in railway operating income," it states that roads sustaining it "shall be paid the amount by which such deficit exceeds the corresponding deficit during the test period," the amount payable determined by comparing "deficit or income during" the control period with the like in the test period. If deficit means decrease in control period income compared with test period income, it must mean decrease in test period income compared with no standard prescribed. Obviously by deficit red ink balances alone make sense and are thus intended.

In so far as it is argued otherwise, for that every month of both control and test period might return a net income though the former less than the latter, and that *any the* said differences by (2) Par. d are to be credited to the carrier and by Pars. f and g ordered to the carrier paid, the answer is any such contingency would disclose the carrier not within the class of beneficiaries by *a* Par. a defined; that (2) Par. d is subsidiary to and cannot extend the granting clause, Par. a, but with (1), (2) and Par. e, serves only for identification and computation; and that it yields to the granting clause and the intent of the statute as a whole.

Those excluded from the grant of indemnity who with propriety might have been included, have no judicial remedy. From any disparity, inequity, hardship, injustice flowing from the granting act, Congress alone can relieve and to it any appeal must be made. Its discretion controls in respect to public grants by it made. If anything *contra* [12] in U. S. vs. Coms., 11 Fed. (2) 554, it is not apparent in the report. The notable feature seems to be that the court disclaiming jurisdiction, lectured the Commission on the law, for which no doubt the Commission is duly grateful.

Defendant further contends that the allowance and certification of its claim by the Interstate Commerce Commission was final and conclusive, that it could not reopen the matter, and that its original certification and payment made are a bar to this action. Many cases are by it cited to the point that where Congress has created a new right and remedy, the decision of any special tribunal provided to vindicate the one and to supply the other is final and beyond judicial review if none has been by Congress authorized. Without review of the citations or attempt to reconcile the irreconcilable, it is believed the instant case comes within the principle that if the special tribunal's decision involves no dispute of fact, and is inspired by and rests upon sheer erroneous construction of the statute, it exceeds this tribunal's authority and the Government can maintain an action at law to recover any money paid by reason of the mistake,—an action not necessarily to review and annul the

decision not mandamus to control discretion, but only to deprive of the benefit of the erroneous decision to compel the beneficiary, to restore what he received, to which he has no right or title, and which in sound morals and good conscience he ought to return. See Talcott vs. U. S., 23 Fed. (2) 901 and citations. Moreover, the Commission in this case was not a special tribunal but a mere auditor in respect to carriers within the statute, to compute and certify the result from the Commission's records and the carrier's reports to it, though doubtless it could receive other evidence. See Great Northern Ry. vs. U. S., 277 U. S. 180. Demurrer overruled.

February 26, 1930.

Filed Feb. 26, 1930.

BOURQUIN, J. [13]

THEREAFTER, on the 28th day of March, 1930, the answer of the defendant to plaintiff's complaint was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

ANSWER.

Comes now the defendant, and for answer to the complaint of plaintiff on file herein, admits, denies and alleges:

I.

Admits the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 14 thereof.

II.

Defendant denies generally and specifically each and every allegation, each and every part, and the whole thereof, contained in Paragraphs 9 and 11 of said complaint.

III.

Answering the allegations contained in Paragraph 10 of said complaint defendant admits that on or about October 17, 1925, said Interstate Commerce Commission filed its report in Finance Docket 2500, Deficit Status of Bingham & Garfield Railway Company, found in Vol. 99, Interstate Commerce Commission Reports, at page 724, wherein it there held and decided that said Section 204 of said Transportation Act, 1920, did not apply to the railroads in said report mentioned.

Except as herein specifically admitted or qualified, defendant denies each and every allegation, and each and every part thereof in said Paragraph 10 contained.

IV.

Answering the allegations contained in Paragraph 12 of said complaint, defendant admits that on or about January 8, 1927, the Interstate Commerce Commission issued an order attempting to reopen [14] the said proceeding, and notified the defendant thereof and to show cause why the certificate of said Commission should not be revoked and the defendant's claim canceled; and in this connection defendant alleges that it appeared specially at said hearing, and by and through its counsel made a special and limited appearance solely for the pur-

pose of objecting to the jurisdiction of the Commission to make or enter any order reopening the said proceedings, or revoking its order, or in any manner making any further order in connection therewith; that said appearance was a special and limited appearance for said purpose and no other, and no other appearance was made in said proceeding on behalf of said defendant.

Except as hereinabove specifically admitted or qualified, defendant denies each and every allegation, and each and every part thereof in said Paragraph 12 contained.

V.

Answering the allegations contained in Paragraph 13 of said complaint, defendant admits that on or about March 7, 1927, the Interstate Commerce Commission by its order attempted to revoke and cancel the certificate issued by it to the defendant on March 20, 1925, and attempted to dismiss said proceeding, and in this connection defendant alleges that at said time and ever since the month of March, 1925, there was no claim or proceeding pending before the Interstate Commerce Commission on behalf of the defendant herein, and that said claim had been adjusted, settled and paid in March, 1925, and thereafter nothing was pending before said Commission concerning which it could make any order in the premises.

Except as hereinbefore specifically admitted or qualified, defendant denies each and every allegation, and each and every part thereof in said Paragraph 13 contained. [15]

VI.

Defendant denies generally and specifically each and every allegation, each and every part thereof and the whole thereof in said complaint contained, and not hereinbefore specifically admitted or denied.

For a first and separate affirmative defense to the complaint of plaintiff herein, the defendant alleges:

I.

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, and is and was the owner and operator of a railroad extending from Butte, Montana, to Anaconda, Montana, as alleged in the complaint.

II.

That between January 1, 1918, and September 27, 1918, inclusive, said railroad was operated under Federal control, and for the remainder of the Federal control period, to wit, from September 28, 1918, to February 29, 1920, inclusive, defendant privately operated the same, and engaged as a common carrier in general transportation, and during said time connected with the Northern Pacific Railway Company, a railroad under Federal control.

III.

That during said last mentioned period the defendant railroad sustained a deficit in private operation of said railroad amounting to the sum of $600,527.35, as defined by Section 204 of the Transportation Act, 1920, and as the word "deficit" was con-

strued by the Interstate Commerce Commission as alleged in Paragraph 4 of plaintiff's complaint herein.

IV.

That following the ruling of the Interstate Commerce Commission, [16] as alleged in said Paragraph 4 of plaintiff's complaint herein, this defendant prepared, made and filed with the Interstate Commerce Commission its claim for the said sum of $600,527.35, and demanded that said Commission certify to the United States Treasury said amount for payment in accordance with the provisions of the Transportation Act, 1920.

V.

That thereafter, and on or about March 14, 1925, the Interstate Commerce Commission caused to be directed to the defendant, through its Treasurer and Auditor, the following proposition of adjustment of said claim:

"INTERSTATE COMMERCE COMMISSION.
BUREAU OF FINANCE.

Washington. VLA:MM
Finance Docket No. 2602.
March 14, 1925.

Mr. P. M. Halloran,
Treasurer and Auditor,
Butte, Anaconda & Pacific Railway Co.,
Anaconda, Montana.

Dear Sir:

I wish to advise that we have completed our analysis of the claim of the Butte, Anaconda & Pacific

Railway Company under section 204 of the Transportation Act, 1920, with the result that we find the amount payable to the carrier for that portion of the period of Federal control during which it operated its property privately, namely, from September 27, 1918, to February 29, 1920, to be $487,116.31, from which there is no amount to be deducted in favor of the Director General as traffic balances or other indebtedness. The amount hereinabove indicated is the amount reported by the Bureau of Accounts as the net credit in favor of the carrier before making the adjustments under the provisions of Paragraph (f) of section 209, required by Paragraph (b) of section 204. We have not found it necessary to make any adjustments under the above-mentioned section.

I am attaching hereto for your signature proposed agreement of acceptance of our ascertainment on the basis hereinabove set forth. If acceptable I shall thank you to execute and file same with the Commission at the earliest date practicable in order that [17] disposition may be made of the case.

Very truly yours,

_____,

Director."

Attachment.

Copy to:

Mr. George H. Parker,
Commerce Counsel,
American Short Line Railroad Association,
1319 F Street, N. W., Washington, D. C."

VI.

That enclosed with the said letter of March 14, 1925, and attached thereto for the signature and approval of the defendant herein was the following agreement of settlement:

"ACCEPTANCE OF ASCERTAINMENT OF THE BUREAU OF FINANCE OF THE INTERSTATE COMMERCE COMMISSION UNDER SECTION 204 OF THE TRANSPORTATION ACT, 1920."

"The Butte, Anaconda & Pacific Railway Company hereby agrees to accept the amount of $487,116.31, ascertained by the Bureau of Finance of the Inter-State Commerce Commission as being the amount payable to it under section 204 of the Transportation Act, 1920, for that portion of the period of Federal control during which it operated its property privately in settlement of all claims against the government under said section 204.

BUTTE, ANACONDA & PACIFIC RAILWAY CO.

By _____"

VII.

That upon the receipt of said letter of March 14, 1925, and of the agreement and release to be signed by the defendant, the defendant caused said agreement to be signed and executed for it and on its behalf by P. M. Halloran, its Treasurer and Auditor, and filed said agreement of settlement with the Interstate Commerce Commission which said Commis-

sion in recognition thereof, and on March 20, 1925, entered its order as follows:

"FINANCE DOCKET No. 2602.

"DEFICIT SETTLEMENT WITH BUTTE, ANACONDA & PACIFIC RY. [18]

"Submitted January 5, 1925. Decided March 20, 1925.

"The amount payable to the Butte, Anaconda & Pacific Railway Company under the provisions of section 204 of the transportation act, 1920, is ascertained to be $487,116.31, from which no amount is deductible as due to the President, as operator of transportation systems under Federal control on account of traffic balances or other indebtedness. Certificate issued.

"GEORGE H. PARKER, WARREN NICHOLS, and P. M. HALLORAN for the Carrier.

"REPORT OF THE COMMISSION.

"DIVISION 4, COMMISSIONERS MEYER, AITCHISON AND EASTMAN, BY DIVISION 4:

"The Butte, Anaconda & Pacific Railway Company, a corporation of the State of Montana, hereinafter termed the carrier, is a steam and electric railroad company which, during the Federal control period, engaged as a common carrier in general transportation, operating a line of railroad between Butte and Anaconda, Mont., approximately 25.3 miles in length, which connected with the Northern Pacific Railway, a railroad under Federal control. It is,

therefore, a carrier within the meaning of paragraph (a) of section 204 of the transportation act, 1920.

"The carrier was under Federal control from January 1, 1918, to September 27, 1918, inclusive, and is entitled to the benefits of section 204 for the period from September 28, 1918, to February 29, 1920, inclusive. Its return under our circular of March 4, 1920, indicated a net credit of $600,527.35 in its favor for the period from September 28, 1918 to February 20, 1920, inclusive. Our examination of its accounts shows the net credit to the carrier for that period to be $487,116.31 before making the adjustments under the provisions of paragraph (f) of section 209, required by paragraph (b) of section 204.

"Consideration has been given by us to the adjustment of maintenance charges and applying, so far as practicable, the rule set forth in the proviso of paragraph (a) of section 5 of the standard contract between the director general and carriers under Federal control, we have fixed the maintenance allowance during the period in question at the amount charged by the carrier.

"We find that there is payable to the carrier under paragraphs (f) and (g) of section 204 of the transportation act, 1920, the sum of $487,116.31, from which no amount is deductible as due to the President, as operator of transportation systems under Federal control, [19] on account of traffic balances or other indebtedness. The carrier has expressed its willingness to accept this amount in final settlement of all its claims against the United States under that section.

"Settlement herein is based upon the commission's report of February 9, 1922, in Finance Docket No. 1600, Construction of the Word 'Deficit,' 66 I. C. C., 765. An appropriate certificate will issue.

"CHAIRMAN AITCHISON did not participate in the disposition of this case."

VIII.

That the Commission thereupon certified to the Treasurer of the United States that the defendant was entitled to receive the said sum of $487,116.31 from the United States treasury, and further certified there was nothing due from the defendant to the President as operator of the transportation system under Federal control (on account of traffic balances or other indebtedness) and thereafter the certificate of the Commission was transmitted by the Treasury to the Comptroller of the United States Treasury with the recommendation that a warrant be issued in favor of the defendant for the said last-mentioned sum, payable from the appropriation "Reimbursement to Carriers of Deficits During Federal Control," and that pursuant to said certificate the Treasury issued a warrant in said sum, which was transmitted to the Treasurer of the United States, and by him paid to the defendant in full on or about March 24, 1925, as a result of the aforesaid action, and pursuant to the order and adjustment made thereon, and that the plaintiff is now estopped from asserting any claim therefor.

For a second and separate affirmative defense to

the complaint of plaintiff herein, the defendant alleges: [20]

I.

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, and is and was the owner and operator of a railroad extending from Butte, Montana, to Anaconda, Montana, as alleged in the complaint.

II.

That between January 1, 1918, and September 27, 1918, inclusive, said railroad was operated under Federal control, and for the remainder of the Federal control period, to wit, from September 28, 1918, to February 29, 1920, inclusive, defendant privately operated the same, and engaged as a common carrier in general transportation, and during said time connected with the Northern Pacific Railway Company, a railroad under Federal control.

III.

That during said last-mentioned period the defendant railroad sustained a deficit in private operation of said railroad amounting to the sum of $600,527.35, as defined by Section 204 of the Transportation Act, 1920, and as the word "deficit" was construed by the Interstate Commere Commission as alleged in paragraph 4 of plaintiff's complaint herein.

IV

That following the ruling of the Interstate Commerce Commission of February 9, 1922 (Construction of the Word "Deficit," 66 I. C. C., 765, Finance Docket 1600), as alleged in paragraph 4 of

plaintiff's complaint herein, the defendant employed accountants and attorneys who prepared, filed and presented to the Interstate Commerce Commission its claim under said Act in the sum of $600,527.35, and in that connection spent large sums of money in the preparation, filing and presentation of said claim, to wit, a sum in excess of $30,000.00. [21]

V.

That thereafter, as alleged in the complaint herein, the said claim of the defendant was adjusted and allowed by the plaintiff in the sum of $487,116.31, which amount was on or about March 24, 1925, paid to said defendant.

VI.

That thereafter, and on or about the 25th day of March, 1925, the defendant, through its regularly constituted directors and officers, authorized and paid out of said sum to its stockholders as a dividend the sum of $375,000.00, which said sum has been paid to and retained by its stockholders, and has now been lost to the defendant company, and that the remainder of said sum of $487,116.31 has been expended by the defendant company in the payment of taxes, operating expenses, maintenance, repairs and other legitimate expenses of the defendant company.

VII.

That the defendant company's railroad extends from the City of Butte to the City of Anaconda, Montana, and its main line consists of 25.29 miles of single track railroad; that the actual full value of said

railroad property in its entirety, for purpose of securing a loan or for sale, does not exceed the sum of $4,200,000.00; that the defendant company is now indebted on account of outstanding bonds, issued on or about the 1st day of February, 1914, in the sum of $2,131,000.00, which indebtedness is secured by a mortgage on all of defendant's property, and that its present current liabilities exceed its current assets.

VIII.

That if a judgment should be entered in this action, as prayed for by the plaintiff and against the defendant, the defendant is and would be without funds with which to pay the same, or any part [22] thereof, and the defendant therefore alleges that if judgment should be entered, as prayed for in the complaint, the defendant would be unable to pay its debts from its own means, as they become due, and would therefore be insolvent under the laws of the State of Montana.

IX.

Defendant further alleges that following the receipt of said moneys from the plaintiff, as herein alleged, said amount was returned to the Government of the United States in its Federal income tax return as required by law in March, 1926, covering its income for the year 1925, and was on said return shown as income returned for taxation under said Federal income tax laws.

X.

That during the year 1926, as required by law, the defendant made a return to the State of Mon-

tana of its income for the year 1925 under the Montana corporation license tax law, in which return was included the said sum of $487,116.31, as income taxable under the laws of the State of Montana in the year 1926 based upon its income for the year 1925.

XI.

That the property of the defendant company was assessed by the local assessors and by the State Board of Equalization of the State of Montana in the year 1926, and the years following.

XII.

That the defendant company's railroad extends through and is operated in more than one county in the State of Montana, and was during all of the years herein mentioned as such assessed by the State Board of Equalization, except such local property as under the law was assessed by the county assessors of the several counties in which the same was located. [23]

XIII.

That in the determination of the value of railroads and other public utilities operated in more than one county in the State of Montana, the State Board of Equalization did take into consideration, as one of the principal factors in the determination of the value of railroads, including defendant's railroad, for assessment purposes, its income for at least five years next preceding such assessment.

XIV.

That under the laws of the State of Montana and

the regulations of the State Board of Equalization, the defendant company, in common with all other railroad companies operating inter-county railroads in the State of Montana, was required to and did report to the State Board of Equalization its income for the year 1925, including the said sum of $487,116.31 so paid to the defendant by the plaintiff herein, and that said sum was taken into consideration and was reflected in the assessed value of the railroad property of the defendant company for the year 1926 and the years following, and that by reason of the said increased income of the defendant railroad company in 1925, its assessed valuation was higher that it would have been had not this additional sum been paid to defendant and shown in its earnings for the year 1925.

XV.

That by reason of the foregoing, the defendant has been compelled to and did pay large sums of money, to wit, many thousands of dollars in taxes on account of the receipt of the said sum of $487,116.31 from the plaintiff herein, and that there is no way in which the defendant may now be reimbursed on account thereof.

XVI.

The defendant further alleges that if it should now be compelled [24] to return said moneys to the plaintiff, as prayed for in the said complaint, or otherwise, or at all, that it would suffer irreparable loss by reason of the premises, and therefore alleges that in sound morals and good con-

science the plaintiff should not be permitted to recover in this action.

For a third and separate affirmative defense to the complaint of plaintiff herein, the defendant alleges:

I.

That between February 9, 1922, the date on which the Interstate Commerce Commission by a general ruling (Construction of the Word "Deficit," 66 I. C. C. 765, Finance Docket 1600) construed the word "deficit" as used in paragraph (a) of Section 204, Transportation Act, 1920, as alleged in paragraph 4 of the complaint and October 17, 1925, when said Interstate Commerce Commission overruled its general order of February 9, 1922, as alleged in paragraph 10 of the complaint herein, the personnel of the Interstate Commerce Commission had been changed in that Commissioners Potter and Daniels had been succeeded by Commissioners McManamy and Woodlock; that the reversal of the original order and construction of the word "deficit," as in the complaint alleged, was made by a majority and minority vote, the two new commissioners, McManamy and Woodlock joining in the majority vote which brought about a reversal of said general order, and that the said two votes were required to make a majority, and that had they voted the other way the original order would have been continued unchanged, and no action taken against the defendant.

The defendant therefore alleges that by reason of the change of the personnel of the Commission, the

newly appointed and acting Commissioners were without power or jurisdiction to reverse, change or modify the orders made by their predecessors in office. [25]

WHEREFORE, defendant having fully answered, prays that it be dismissed hence, with its costs herein necessarily expended.

L. O. EVANS,
WARREN NICHOLS,
D. M. KELLY, and
JOHN A. GROENEVELD,
Attorneys for Defendant, Butte, Anaconda & Pacific Railway Company.

State of Montana,
County of Silver Bow,—

D. M. Kelly, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant, Butte, Anaconda & Pacific Railway Company, and makes this verification for and on behalf of the said defendant, for the reason that there is no officer of the said defendant, Butte, Anaconda & Pacific Railway Company, within Silver Bow County, Montana, which is the county wherein affiant resides; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

D. M. KELLY.

Subscribed and sworn to before me this 27th day of March, A. D. 1930.

[Notarial Seal] J. A. LIVINGSTON, Jr.,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires Feb. 26th, 1932.

Filed March 28, 1930.

THEREAFTER, on the 18th day of April, 1930, the demurrer of the plaintiff to answer of the defendant was duly filed herein, in the words and figures following, to wit: [26]

(Title of Court and Cause.)

DEMURRER TO ANSWER.

Now comes plaintiff and demurs to the answer of defendant on file herein as follows:

I.

Demurs to the defense set forth on pages 1, 2 and 3 thereof, upon the ground and for the reason that the same does not state facts sufficient to constitute a defense.

II.

Demurs to the "first and separate affirmative defense" set forth on pages 3 to 8, inclusive, of said answer, upon the ground and for the reason that the same does not state facts sufficient to constitute a defense.

III.

Demurs to the "first and separate affirmative de-

fense" set forth on pages 3 to 8, inclusive, of said answer, upon the ground and for the reason that the same is insufficient in law upon the face thereof.

IV.

Demurs to the "second and separate affirmative defense" set forth on pages 8 to 12, inclusive, of said answer, upon the ground and for the reason that the same does not state facts sufficient to constitute a defense.

V.

Demurs to the "second and separate affirmative defense" set forth on pages 8 to 12, inclusive, of said answer, upon the ground and for the reason that the same is insufficient in law upon the face thereof.

VI.

Demurs to the "third and separate affirmative defense" set forth on pages 12 and 13 of said answer, upon the ground and for the [27] reason that the same does not state facts sufficient to constitute a defense.

VII.

Demurs to the "third and separate affirmative defense" set forth on pages 12 and 13 of said answer, upon the ground and for the reason that the same is insufficient in law upon the face thereof.

VIII.

Demurs to the whole of said answer upon the

ground and for the reason that the said answer does not state facts sufficient to constitute a defense.

WELLINGTON D. RANKIN,
United States Attorney.
HOWARD A. JOHNSON,
Assistant United States Attorney.
ARTHUR P. ACHER,
Assistant United States Attorney.

Filed April 18, 1930.

THEREAFTER, on the 31st day of May, 1930, the order of the above-entitled court overruling plaintiff's demurrer to the second defense in defendant's answer and sustaining plaintiff's demurrer to defendant's answer in all else was entered in the minutes of the court, in the words and figures following, to wit:

(Title of Court and Cause.)

ORDER OVERRULING DEMURRER TO ANSWER IN PART AND SUSTAINING IN PART.

This cause heretofore duly heard and submitted to the court came on regularly this day for the decision of the court. Thereupon, after due consideration, court filed its written decision and ordered that plaintiff's demurrer to the answer herein be and is overruled as to the 2d defense and in all else is sustained.

Entered May 31st, 1930. [28]

THEREAFTER, on the 31st day of May, 1930, the decision of the above-entitled court, by written opinion, overruling plaintiff's demurrer to the second defense contained in defendant's answer, and sustaining plaintiff's demurrer to all else in said answer was duly filed herein, in the words and figures following, to wit:

(Title of Court and Court.)

DECISION OVERRULING PLAINTIFF'S DEMURRER TO THE SECOND DEFENSE IN DEFENDANT'S ANSWER AND SUSTAINING PLAINTIFF'S DEMURRER TO ALL ELSE IN SAID ANSWER.

General demurrer to defendant's answer.

The latter admits all vital in the complaint, and includes "affirmative defenses,"—

1st. That the I. C. C. offered to pay part only of what defendant claimed, and solicited defendant's acceptance in settlement, which was given, and that plaintiff "is now estopped from asserting any claim therefor."

2d. That in and about asserting its claim defendant expended much money, has paid income taxes on the amount received on the claim, distributed most of it in dividends, expended the balance on its road; that by return of the money to the United States, defendant would suffer irreparable loss, and the return would be contrary to "sound morals and good conscience."

3d. That the I. C. C.'s change of decision was after change of personnel and without jurisdiction.

In the matter of the 1st defense, defendant cites many cases to the point that accord and compromise of litigated or disputed claims are favored by public policy, and if accomplished, will not be reopened save if tainted by fraud or mistake other than of law; and that the rule applies to Government as to individuals.

Sound enough, but defendant's case does not come within their purview. They relate, as a rule, to legal claims enforceable and settled by Government agents with authority, or like claims affected by mere irregularity of procedure in settlement. [29]

None like this at bar where was nothing but a gratuity to be dispensed, the Government's agent, the I. C. C., having no authority to compromise but only to identify beneficiaries, compute the amount, and certify it to a treasury without authority to do other than pay the certified amount. That the I. C. C. required defendant to execute a "proposed agreement of acceptance" and "in settlement of all claims," goes for nothing save to indicate the dictatorial spirit too often found in our too common "commissions."

The 2d defense counts upon various disbursements by defendant, both in securing the money from the Government and of money itself. In so far as defendant paid money to plaintiff by way of income taxes upon the money by the former received from the latter, it would seem to be entitled

to credit herein. Had it thus paid all, returned all, no reason appears why it would not be a complete defense.

Sec. 774, T. 28, U. S. C. A. seems inapplicable. Even in an accounting case, "independent of any statute provision, the defendant would have a right to show that he had accounted for the value of such advance by delivering the equivalent for which it was made." U. S. vs. Wilkins, 6 Wheat. 145.

In equity and good conscience, defendant liable to plaintiff for the money without authority received, likewise is not liable for so much thereof or equivalent returned. Asking equity, plaintiff must do equity. All else in said defense is insufficient to that end.

Defendant knew the law as well as plaintiff's agents did. Its counsel no doubt was well paid to perpetuate the erroneous construction of it by said agents.

The latter's disharmony was additional notice and warning. [30] Defendant took the chances of the lack of authority in said agents to award and make payment. It knew it was not within the class of beneficiaries by the statute created.

So here, too, the cases and rules it cites, have no application to the circumstances of this its case.

The 3d defense avails nothing. It is true the I. C. C.'s change of opinion subsequent to payment made, affects defendant's status not at all.

The I. C. C.'s pretended rehearing and rejection of defendant's claim were but idle gestures, and added nothing to defendant's liability. That was

complete when defendant received the money, and continued regardless of any I. C. C. fulminations of whatever variety thereafter.

It follows the demurrer is overruled to the 2d defense; in all else, sustained.

May 31, 1930.

BOURQUIN, J.

Filed May 31, 1930.

THEREAFTER, on the 8th day of December, 1930, the amended answer of the defendant to plaintiff's complaint was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

AMENDED ANSWER.

Comes now the defendant, and for answer to the complaint of plaintiff on file herein, admits, denies and alleges:

I.

Admits the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 14 thereof.

II.

Defendant denies generally and specifically each and every [31] allegation, each and every part, and the whole thereof, contained in Paragraphs 9 and 11 of said complaint.

III.

Answering the allegations contained in Para-

graph 10 of said complaint, defendant admits that on or about October 17, 1925, said Interstate Commerce Commission filed its report in Finance Docket 2500, Deficit Status of Bingham & Garfield Railway Company, found in Vol. 99, Interstate Commerce Commission Reports at page 724, wherein it there held and decided that said Section 204 of said Transportation Act, 1920, did not apply to the railroads in said report mentioned.

Except as herein specifically admitted or qualified, defendant denies each and every allegation, and each and every part thereof in said Paragraph 10 contained.

IV.

Answering the allegations contained in Paragraph 12 of said complaint, defendant admits that on or about January 8, 1927, the Interstate Commerce Commission issued an order attempting to reopen the said proceeding, and notified the defendant thereof and to show cause why the certificate of said Commission should not be revoked and the defendant's claim cancelled; and in this connection defendant alleges that it appeared specially at said hearing, and by and through its counsel made a special and limited appearance solely for the purpose of objecting to the jurisdiction of the Commission to make or enter any order reopening the said proceedings, or revoking its order, or in any manner making any further order in connection therewith; that said appearance was a special and limited appearance for said purpose and no other,

and no other appearance was made in said proceeding on behalf of said defendant. [32]

Except as hereinabove specifically admitted or qualified, defendant denies each and every allegation, and each and every part thereof in said paragraph 12 contained.

V.

Answering the allegations contained in Paragraph 13 of said complaint, defendant admits that on or about March 7, 1927, the Interstate Commerce Commission by its order attempted to revoke and cancel the certificate issued by it to the defendant on March 20, 1925, and attempted to dismiss said proceeding, and in this connection defendant alleges that at said time and ever since the month of March, 1925, there was no claim or proceeding pending before the Interstate Commerce Commission on behalf of the defendant herein, and that said claim had been adjusted, settled and paid in March, 1925, and thereafter nothing was pending before said Commission concerning which it could make any order in the premises.

Except as hereinbefore specifically admitted or qualified, defendant denies each and every allegation, and each and every part thereof in said Paragraph 13 contained.

VI.

Defendant denies generally and specifically each and every allegation, each and every part thereof and the whole thereof in said complaint contained, and not hereinbefore specifically admitted or denied.

For a first and separate affirmative defense to

the complaint of plaintiff herein, the defendant alleges:

I.

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, and is and was the owner and operator of a railroad extending from Butte, Montana, to [33] Anaconda, Montana, as alleged in the complaint.

II.

That between January 1, 1918, and September 27, 1918, inclusive, said railroad was operated under Federal control, and for the remainder of the Federal control period, to wit, from September 28, 1918, to February 29, 1920, inclusive, defendant privately operated the same, and engaged as a common carrier in general transportation, and during said time connected with the Northern Pacific Railway Company, a railroad under Federal control.

III.

That during said last-mentioned period the defendant railroad sustained a deficit in private operation of said railroad amounting to the sum of $600,527.35, as defined by Section 204 of the Transportation Act, 1920, and as the word "deficit" was construed by the Interstate Commerce Commission as alleged in Paragraph 4 of plaintiff's complaint herein.

IV.

That following the ruling of the Interstate Commerce Commission, as alleged in said Paragraph 4

of plaintiff's complaint herein, this defendant prepared, made and filed with the Interstate Commerce Commission its claim for the said sum of $600,-527.35, and demanded that said Commission certify to the United States Treasury said amount for payment in accordance with the provisions of the Transportation Act, 1920.

V.

That thereafter, and on or about March 14, 1925, the Interstate Commerce Commission caused to be directed to the defendant, through its Treasurer and Auditor, the following proposition of adjustment of said claim: [34]

"INTERSTATE COMMERCE COMMISSION,
Bureau of Finance,
Washington.

VLA:MM.
Finance Docket No. 2602.
March 14, 1925.

Mr. P. M. Halloran,
Treasurer and Auditor,
Butte, Anaconda & Pacific Railway Co.,
Anaconda, Montana.

Dear sir:

I wish to advise that we have completed our analysis of the claim of the Butte, Anaconda & Pacific Railway Company under section 204 of the Transportation Act, 1920, with the result that we find the amount payable to the carrier for that portion of the period of Federal control during which it operated its property privately, namely, from September 27,

1918, to February 29, 1920, to be $487,116.31, from which there is no amount to be deducted in favor of the Director General as traffic balances or other indebtedness. The amount hereinabove indicated is the amount reported by the Bureau of Accounts as the net credit in favor of the carrier before making the adjustments under the provisions of paragraph (f) of section 209, required by paragraph (b) of section 204. We have not found it necessary to make any adjustments under the above mentioned section.

I am attaching hereto for your signature proposed agreement of acceptance of our ascertainment on the basis hereinabove set forth. If acceptable I shall thank you to execute and file same with the Commission at the earliest date practicable in order that disposition may be made of the case.

Very truly yours,

_____,

Director."

Attachment.

Copy to:

Mr. George H. Parker,
Commerce Counsel,
American Short Line Railroad Association,
1319 F Street, N. W., Washington, D. C."

VI.

That enclosed with the said letter of March 14, 1925, and attached thereto for the signature and approval of the defendant herein was the following agreement of settlement:

"ACCEPTANCE OF ASCERTAINMENT OF THE BUREAU OF FINANCE OF THE INTERSTATE COMMERCE COMMISSION UNDER SECTION 204 OF THE TRANSPORTATION ACT, 1920." [35]

"The Butte, Anaconda & Pacific Railway Company hereby agrees to accept the amount of $487,116.31, ascertained by the Bureau of Finance of the Interstate Commerce Commission as being the amount payable to it under section 204 of the Transportation Act, 1920, for that portion of the period of Federal control during which it operated its property privately in settlement of all claims against the government under said section 204.

BUTTE, ANACONDA & PACIFIC RAILWAY CO.

By ——————————."

VII.

That upon the receipt of said letter of March 14, 1925, and of the agreement and release to be signed by the defendant, the defendant caused said agreement to be signed and executed for it and on its behalf by P. M. Halloran, its Treasurer and Auditor, and filed said agreement of settlement with the Interstate Commerce Commission, which said Commission in recognition thereof, and on March 20, 1925, entered its order as follows:

"FINANCE DOCKET No. 2602.

"DEFICIT SETTLEMENT WITH BUTTE, ANACONDA & PACIFIC RY.

"Submitted January 5, 1925. Decided March 20, 1925.

"The amount payable to the Butte, Anaconda & Pacific Railway Company under the provisions of section 204 of the transportation act, 1920, is ascertained to be $487,116.31, from which no amount is deductible as due to the President, as operator of transportation systems under Federal control, on account of traffic balances or other indebtedness. Certificate issued.

"GEORGE H. PARKER, WARREN NICHOLS, and P. M. HALLORAN for the Carrier.

"REPORT OF THE COMMISSION.

"DIVISION 4, COMMISSIONERS MEYER, AITCHISON AND EASTMAN, BY DIVISION 4:

"The Butte, Anaconda & Pacific Railway Company, a corporation of the State of Montana, hereinafter termed the carrier, is a steam and electric railroad company which, during the Federal control period, engaged as a common carrier in general transportation, operating a [36] line of railroad between Butte and Anaconda, Mont., approximately 25.3 miles in length, which connected with the Northern Pacific Railway, a railroad under Federal control. It is, therefore, a carrier within the meaning

of paragraph (a) of section 204 of the transportation act, 1920.

"The carrier was under Federal control from January 1, 1918, to September 27, 1918, inclusive, and is entitled to the benefits of section 204 for the period from September 28, 1918, to February 29, 1920, inclusive. Its return under our circular of March 4, 1920, indicated a net credit of $600,527.35 in its favor for the period from September 28, 1918, to February 20, 1920, inclusive. Our examination of its accounts shows the net credit to the carrier for that period to be $487,116.31 before making the adjustments under the provisions of paragraph (f) of section 209, required by paragraph (b) of section 204.

"Consideration has been given by us to the adjustment of maintenance charges and applying, so far as practicable, the rule set forth in the proviso of paragraph (a) of section 5 of the standard contract between the director general and carriers under Federal control, we have fixed the maintenance allowance during the period in question at the amount charged by the carrier.

"We find that there is payable to the carrier under paragraphs (f) and (g) of section 204 of the transportation act, 1920, the sum of $487,116.31, from which no amount is deductible as due to the President, as operator of transportation systems under Federal control, on account of traffic balances or other indebtedness. The carrier has expressed its willingness to accept this amount in final settlement of all its claims against the United States under that section.

"Settlement herein is based upon the commission's report of February 9, 1922, in Finance Docket No. 1600, Construction of the Word 'Deficit,' 66 I. C. C., 765. An appropriate certificate will issue.

"Chairman AITCHISON did not participate in the disposition of this case."

VIII.

That the Commission thereupon certified to the Treasurer of the United States that the defendant was entitled to receive the said sum of $487,116.31 from the United States Treasury, and further certified there was nothing due from the defendant to the President as operator of the transportation system under Federal control (on account of traffic balances or other indebtedness) [37] and thereafter the certificate of the Commission was transmitted by the Treasury to the Comptroller of the United States Treasury with the recommendation that a warrant be issued in favor of the defendant for the said last-mentioned sum, payable from the appropriation "Reimbursement to Carriers of Deficit During Federal Control," and that pursuant to said certificate the Treasury issued a warrant in said sum, which was transmitted to the Treasurer of the United States, and by him paid to the defendant in full on or about March 24, 1925, as a result of the aforesaid action, and pursuant to the order and adjustment made thereon, and that the plaintiff is now estopped from asserting any claim therefor.

For a second and separate affirmative defense to the complaint of plaintiff herein, the defendant alleges:

I.

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Montana and is and was the owner and operator of a railroad extending from Butte, Montana, to Anaconda, Montana, as alleged in the complaint.

II.

That between January 1, 1918, and September 27, 1918, inclusive, said railroad was operated under Federal control, and for the remainder of the Federal control period, to wit, from September 28, 1918, to February 29, 1920, inclusive, defendant privately operated the same, and engaged as a common carrier in general transportation, and during said time connected with the Northern Pacific Railway Company, a railroad under Federal control.

III.

That during said last-mentioned period the defendant railroad [38] sustained a deficit in private operation of said railroad amounting to the sum of $600,527.35, as defined by Section 204 of the Transportation Act, 1920, and as the word "deficit" was construed by the Interstate Commerce Commission in paragraph 4 of plaintiff's complaint herein.

IV.

That the following ruling of the Interstate Commerce Commission of Feburary 9, 1922 (Construc-

tion of the Word "Deficit," 66 I. C. C., 765, Finance Docket 1600), as alleged in paragraph 4 of plaintiff's complaint herein, the defendant employed accountants and attorneys who prepared, filed and presented to the Interstate Commerce Commission its claim under said Act in the sum of $600,527.35, and in that connection spent large sums of money in the preparation, filing and presentation of said claim, to wit, a sum in excess of $30,000.00.

V.

That thereafter, as alleged in the complaint herein, the said claim of the defendant was adjusted and allowed by the plaintiff in the sum of $487,116.31, which amount was on or about March 24, 1925, paid to said defendant.

VI.

That thereafter, and on or about the 25th day of March, 1925, the defendant, through its regularly constituted directors and officers, authorized and paid out of said sum to its stockholders as a dividend the sum of $375,000.00, which said sum has been paid to and retained by its stockholders, and has now been lost to the defendant company, and that the remainder of said sum of $487,116.31 has been expended by the defendant company in the payment of taxes, operating expenses, maintenance, repairs and other legitimate expenses of the defendant company. [39]

VII.

That the defendant Company's railroad extends from the City of Butte to the City of Anaconda,

Montana, and its main line consists of 25.29 miles of single track railroad; that the actual full value of said railroad property in its entirety, for purpose of securing a loan or for sale, does not exceed the sum of $4,200,000.00; that the defendant company is now indebted on account of outstanding bonds issued on or about the 1st day of February, 1914, in the sum of $2,131,000.00, which indebtedness is secured by a mortgage on all of defendant's property, and that its present current liabilities exceed its current assets.

VIII.

That if a judgment should be entered in this action, as prayed for by the plaintiff and against the defendant, the defendant is and would be without funds with which to pay the same, or any part thereof, and the defendant therefore alleges that if judgment should be entered, as prayed for in the complaint, the defendant would be unable to pay its debts from its own means, as they become due, and would therefore be insolvent under the laws of the State of Montana.

IX.

That during the year 1926, as required by law, the defendant made a return to the State of Montana, of its income for the year 1925 under the Montana corporation license tax law, in which return was included the said sum of $487,116.31, as income taxable under the laws of the State of Montana in the year 1926 based upon its income for the year 1925.

X.

That the property of the defendant company was assessed by the local assessors and by the State Board of Equalization of the State of Montana in the year 1926, and the years following. [40]

XI.

That the defendant company's railroad extends through and is operated in more than one county in the State of Montana, and was during all of the years herein mentioned as such assessed by the State Board of Equalization, except such local property as under the law was assessed by the county assessors of the several counties in which the same was located.

XII.

That in the determination of the value of railroads and other public utilities operated in more than one county in the State of Montana, the State Board of Equalization did take into consideration, as one of the principal factors in the determination of the value of railroads, including defendant's railroad, for assessment purposes, its income for at least five years next preceding such assessment.

XIII.

That under the laws of the State of Montana and the regulations of the State Board of Equalization, the defendant company, in common with all other railroad companies operating inter-county railroads in the State of Montana, was required to and did report to the State Board of Equalization its in-

come for the year 1925, including the said sum of $487,116.31 so paid to the defendant by the plaintiff herein, and that said sum was taken into consideration and was reflected in the assessed value of the railroad property of the defendant company for the year 1926, and the years following, and that by reason of the said increased income of the defendant railroad company in 1925, its assessed valuation was higher than it would have been had not this additional sum been paid to defendant and shown in [41] its earnings for the year 1925.

XIV.

That by reason of the foregoing, the defendant has been compelled to and did pay large sums of money, to wit, many thousands of dollars in taxes on account of the receipt of the said sum of $487,116.31 from the plaintiff herein, and that there is no way in which the defendant may now be reimbursed on account thereof.

XV.

The defendant further alleges that if it should now be compelled to return said moneys to the plaintiff, as prayed for in the said complaint, or otherwise, or at all, that it would suffer irreparable loss by reason of the premises, and therefore alleges that in sound morals and good conscience the plaintiff should not be permitted to recover in this action.

For a third and separate affirmative defense to the complaint of plaintiff herein, the defendant alleges:

I.

That between February 9, 1922, the date on which the Interstate Commerce Commission by a general ruling (Construction of the Word "Deficit," 66 I. C. C. 765, Finance Docket 1600) construed the word "deficit" as used in Paragraph (a) of section 204, Transportation Act, 1920, as alleged in Paragraph 4 of the complaint, and October 17, 1925, when said Interstate Commerce Commission overruled its general order of February 9, 1922, as alleged in Paragraph 10 of the complaint herein, the personnel of the Interstate Commerce Commission had been changed in that Commissioners Potter and Daniels had been succeeded by Commissioners McManamy and Woodlock; that the reversal of the original order and construction of the word "deficit," as in the complaint alleged, [42] was made by a majority and minority vote, the two new Commissioners, McManamy and Woodlock joining in the majority vote which brought about a reversal of said general order, and that the said two votes were required to make a majority, and that had they voted the other way the original order would have been continued unchanged, and no action taken against the defendant.

The defendant therefore alleges that by reason of the change of the personnel of the Commission, the newly appointed and acting Commissioners were without power or jurisdiction to reverse, change or modify the orders made by their predecessors in office.

WHEREFORE, defendant having fully answered, prays that it be dismissed hence, with its costs herein necessarily expended.

L. O. EVANS,
WARREN NICHOLS,
D. M. KELLY, and
JOHN A. GROENEVELD,
Attorneys for Defendant, Butte, Anaconda & Pacific Railway Company.

State of Montana,
County of Silver Bow,—ss.

D. M. Kelly, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant, Butte, Anaconda & Pacific Railway Company, and makes this verification for and on behalf of the said defendant, for the reason that there is no officer of the said defendant, Butte, Anaconda & Pacific Railway Company, within Silver Bow County, Montana, which is the county wherein affiant resides; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

D. M. KELLY. [43]

Subscribed and sworn to before me this 4th day of December, 1930.

[Notarial Seal] ADOLPH TURK,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires July 11, 1931.

Service of the foregoing answer admitted, and copy received, this 8th day of December, 1930.

WELLINGTON D. RANKIN,
Attorney for Plaintiff, United States of America.

Filed December 8, 1930.

THEREAFTER, on the 26th day of December, 1930, plaintiff's motion for judgment on the pleadings was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

MOTION FOR JUDGMENT ON PLEADINGS.

Comes now the plaintiff in the above-entitled action and moves the court for judgment in favor of said plaintiff and against the defendant herein upon the pleadings on file herein, upon the ground and for the reason that the amended answer of said defendant on file herein, fails to state facts sufficient to constitute a defense to plaintiff's complaint on file herein.

Dated this 24th day of December, 1930.

WELLINGTON D. RANKIN,
United States Attorney,
HOWARD A. JOHNSON,
Assistant U. S. Attorney,
ARTHUR P. ACHER,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

Filed December 26, 1930. [44]

THEREAFTER, on the 27th day of December, 1930, the order of the above-entitled court granting plaintiff's motion for judgment on the pleadings, and ordering judgment entered accordingly was duly entered in the minutes of the court, in the words and figures following, to wit:

(Title of Court and Cause.)

ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS.

This cause was duly called up for hearing on plaintiff's motion for judgment on the pleadings. W. D. Rankin, Esq., U. S. Attorney, appearing for plaintiff, and D. M. Kelly, Esq., being present and appearing for the defendant. Thereupon on the statements of counsel said motion was submitted to the court, and after due consideration, Court ordered that said motion be granted and judgment ordered entered accordingly.

Entered December 27, 1930.

THEREAFTER, on the 2d day of February, 1931, the decision of the above-entitled court, by written opinion, determining the said plaintiff is entitled to interest from demand made at the Montana rate rather than that of the District of Columbia, was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

COURT'S RULING IN RE INTEREST.

The Court is of opinion that plaintiff is entitled to interest from demand made at the Montana rate rather than that of District Columbia.

Those who secure money by mistake are in equity and by statute (Sec. 7887, R. C. Montana) an involuntary trustee, bound to restore on demand and with interest (Sec. 7897 Id.). See also Secs. 7578, 8662, Id., the United States present in all states, the defendant domiciled in Montana, the former obliged to pursue the latter in [45] Montana, like individuals it is entitled to the benefit of the local statutes whatever it might be in the light of other law.

January 31, 1931.

BOURQUIN, J.

Filed February 2, 1931.

THEREAFTER, on the 2d day of February, 1931, the order af the above-entitled court for interest on the Montana rate and that judgment be entered *nunc pro tunc* as of the date the order was made granting plaintiff's motion for judgment on the pleadings was duly entered in the minutes of the court, in the words and figures following, to wit:

(Title of Court and Cause.)

ORDER FOR INTEREST AT MONTANA RATE AND DIRECTING THAT JUDGMENT BE ENTERED NUNC PRO TUNC AS OF THE DATE THE ORDER WAS MADE GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS.

This cause heretofore submitted to the court in the matter of interest came on regularly this day for decision. Thereupon after due consideration the court filed its ruling thereon, wherein the court finds the plaintiff is entitled to interest from demand made at the Montana rate rather than that of the District of Columbia. Thereupon, on motion of Mr. W. D. Rankin, United States Attorney, the court ordered that judgment be entered herein *nunc pro tunc* of the date the order was made granting plaintiff's motion for judgment on the pleadings.

Entered February 2, 1931.

THEREAFTER, on the 3d day of February, 1931, the judgment was duly filed and entered *nunc pro tunc* as of the 27th day of December, 1930, in the words and figures following, to wit:

(Title of Court and Cause.)

JUDGMENT.

This cause came on regularly to be heard on the 27th day of December, 1930, plaintiff being represented by Wellington D. Rankin, [46] United

States Attorney for the District of Montana, and defendant being represented by D. M. Kelly, its counsel herein, and

Upon motion of Wellington D. Rankin for judgment for the plaintiff and against said defendant upon the pleadings on file herein, and the matter having been duly presented and submitted by respective counsel and the court having fully considered the same and being fully advised, granted said motion in behalf of plaintiff for judgment upon the pleadings herein, whereupon the court ordered judgment in favor of the plaintiff as prayed for in its complaint and against the defendant.

WHEREFORE, by virtue of the law and by reason of the premises, IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED that the plaintiff, the United States of America, do have and recover of and from the defendant, Butte, Anaconda & Pacific Railway Company, a corporation, the sum of Four Hundred Eighty-seven Thousand One Hundred Sixteen Dollars and Thirty-one Cents ($487,116.31), with lawful interest thereon at the rate of eight per cent per annum from the 8th day of June, 1928, to the date of entry hereof, together with plaintiff's costs herein incurred, taxed in the sum of $22.00.

Entered this 3d day of February, 1931, *nunc pro tunc* as of December 27, 1930.

C. R. GARLOW,
Clerk, U. S. District Court, District of Montana.
By L. R. Polglase,
Deputy.

Filed February 3, 1931.

THEREAFTER, on the 13th day of March, 1931, the assignment of errors of defendant, petitioner and appellant was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.) [47]

ASSIGNMENT OF ERRORS ON BEHALF OF THE BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, A CORPORATION, THE DEFENDANT, PETITIONER AND APPELLANT.

Comes now the Butte, Anaconda & Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, defendant in the above-entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause from the judgment of the above-entitled court, entered in the above-entitled court and cause on the 3d day of February, 1931, *nunc pro tunc* as of the 27th day of December, 1930:

I.

The Court erred in overruling the demurrer filed by the defendant to the complaint of the plaintiff in the above-entitled cause.

II.

The Court erred in sustaining plaintiff's motion for judgment on the pleadings and ordering judgment in favor of the plaintiff and against the defendant.

III.

The Court erred in allowing the plaintiff, above named, interest from demand on the amount found due to the plaintiff, above named, in the said judgment entered in the above-entitled cause.

IV.

The Court erred in deciding that the plaintiff, above named, was entitled to interest at the Montana rate, to wit, eight per cent (8%), rather than the District of Columbia rate, to wit, six per cent (6%), on the amount found due to the plaintiff, above named, in the said judgment entered in the above-entitled cause.

V.

The Court erred in concluding, deciding and ordering that the [48] plaintiff, above named, is entitled to recover, and that judgment should be entered in favor of the plaintiff, above named.

WHEREFORE, defendant, Butte, Anaconda & Pacific Railway Company, a corporation, prays that the said judgment of the said District Court of the United States for the District of Montana, may be corrected and reversed, and for such other and further relief as to the court may seem just and proper.

Dated this 13th day of March, 1931.

L. O. EVANS,
D. M. KELLY,
WARREN NICHOLS,
JOHN A. GROENEVELD,
Attorneys for Defendant, Butte, Anaconda & Pacific Railway Company, a Corporation.

Service of the within and foregoing assignment of errors on behalf of the Butte, Anaconda & Pacific Railway Company, a corporation, defendant, petitioner and appellant, acknowledged, and copy thereof received this 13th day of March, 1931.

WELLINGTON D. RANKIN,
U. S. Attorney,
HOWARD A. JOHNSON,
Asst. U. S. Attorney,
Attorneys for Plaintiff, United States of America.

Filed March 13, 1931.

THEREAFTER, on the 13th day of March, 1931, defendant's petition for allowance of appeal was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States, for the District of Montana: [49]

The Butte, Anaconda & Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, your petitioner herein and the defendant in the above-entitled cause, conceiving itself aggrieved by the judgment entered in the above-entitled court and cause on the 3d day of February, 1931, *nunc*

pro tunc as of the 27th day of December, 1930, does hereby appeal from said judgment to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith; and the said defendant and petitioner herein, Butte, Anaconda & Pacific Railway Company, prays that an appeal may be allowed to it from the District Court of the United States for the District of Montana to the said United States Circuit Court of Appeals, for the Ninth Circuit, and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit; and the said defendant, Butte, Anaconda & Pacific Railway Company, your petitioner herein, further prays that a proper order fixing the amount of security which the said defendant, Butte, Anaconda & Pacific Railway Company shall give and furnish upon such appeal be made.

Dated March 13th, 1931.

L. O. EVANS,
D. M. KELLY,
WARREN NICHOLS,
JOHN A. GROENEVELD,
Attorneys for Defendant, Butte, Anaconda & Pacific Railway Company, a Corporation.

Service of the within and foregoing petition for allowance of appeal acknowledged, and copy thereof received this 13th day of March, 1931. [50]

WELLINGTON D. RANKIN,
U. S. Attorney.
HOWARD A. JOHNSON,
Asst. U. S. Atty.,
Attorneys for Plaintiff, United States of America.

Filed March 13, 1931.

THEREAFTER, on the 13th day of March, 1931, the order of the court allowing an appeal was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

The petition of the Butte, Anaconda & Pacific Railway Company, a Montana corporation, defendant in the above-entitled cause, for an appeal from the judgment entered in the above-entitled court and cause on the 3d day of February, 1931, *nunc pro tunc* as of the 27th day of December, 1930, is hereby granted, and the appeal is hereby allowed, and the bond on appeal is hereby fixed in the sum of $300.00, a supersedeas bond having been waived by stipulation of counsel filed in the above-entitled cause.

Dated this 13 day of March, 1931.

BOURQUIN,
Judge.

Filed March 13, 1931.

THEREAFTER, on the 13th day of March, 1931, the stipulation of the parties *in re* supersedeas bond was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

STIPULATION IN RE SUPERSEDEAS BOND.

IT IS HEREBY STIPULATED by and between the parties hereto, by [51] and through their respective counsel, that;

WHEREAS the above-entitled action and proceeding involves the litigation in court of questions between the plaintiff herein and other parties than the defendant herein, and

WHEREAS, the above-entitled action and proceeding is a test case, and

WHEREAS, the defendant in the above-entitled action and proceeding is desirous of appealing from the judgment therein, duly given and made, rendered and entered on the 3d day of February, 1931, *nunc pro tunc* as of December 27, 1930, to the United States Circuit Court of Appeals for the Ninth Circuit,—

NOW, THEREFORE, the said defendant in the above-entitled action and proceeding shall not be required to file therein a supersedeas bond, and that the plaintiff in the above-entitled action will not have execution issued on said judgment until the final determination of the appeal in said action and proceeding to the United States Circuit Court of Appeals for the Ninth Circuit, and that execution on said judgment may be stayed until said time.

Dated this 4th day of March, 1931.

WELLINGTON D. RANKIN,
Attorneys for Plaintiff.

L. O. EVANS,
WARREN NICHOLS,
D. M. KELLY,
JOHN A. GROENEVELD,
Attorneys for Defendant.

Filed March 13, 1931.

THEREAFTER, on the 13th day of March, 1931, the bond of the defendant for costs on appeal was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.) [52]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, the Butte, Anaconda & Pacific Railway Company, a Montana corporation, as principal, and

Jas. T. Finlen and Jno. J. Burke, as sureties, are held and firmly bound unto the United States of America in the sum of Three Hundred 00/100 Dollars, the payment of which well and truly to be made, we bind ourselves jointly and severally, and each of our heirs, executors, administrators, successors, and assigns, firmly by these presents, sealed with our seals, and dated this 13th day of March, 1931.

WHEREAS, the principal above named has petitioned for and been allowed by the District Court of the United States for the District of Montana, an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to correct and reverse a judgment rendered and entered in the above-entitled court and cause on the 3d day of February, 1931, *nunc pro tunc* as of the 27th day of December, 1930,—

NOW, THEREFORE, the condition of the above obligation is such that if the said Butte, Anaconda & Pacific Railway Company, defendant, petitioner and appellant herein, shall prosecute its appeal to effect, and answer all costs if it fails to make its plea good then the above obligation to be void; else to remain in full force and virtue.

IN WITNESS WHEREOF, the said Butte, Anaconda & Pacific Railway Company, a corporation, has caused the within instrument to be executed and its corporate seal affixed by its officers thereunto duly authorized, and the said Jas. T. Finlen and

Jno. J. Burke have hereunto set their hands and seals this 13th day of March, 1931.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY.

By J. R. HOBBINS,
Its Vice-president,
Principal. [53]

[Corporate Seal]

Attest: P. M. HALLORAN,
Its Secretary.

JAS. T. FINLEN,
JNO. J. BURKE,
Sureties.

United States of America,
District of Montana,
County of Silver Bow,—ss.

Jas. T. Finlen and Jno. J. Burke, sureties on the within and foregonig bond, being severally duly sworn, on oath, each for himself deposes and says: That he is a resident and freeholder within the State of Montana, and is worth the sum specified in the within and foregoing bond as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

JAS. T. FINLEN.
JNO. J. BURKE.

Subscribed and sworn to before me this 13th day of March, 1931.

[Notarial Seal] JOHN. A. GROENEVELD,
Notary Public for the State of Montana, Residing at Butte, Montana.

My commission expires Nov. 5, 1931.

The within and foregoing bond is hereby approved this 13th day of March, 1931.

BOURQUIN,
Judge.

Filed March 13, 1931.

THEREAFTER, on the 13th day of March, 1931, the citation was duly issued herein, which original citation with admission of service thereon is hereto annexed and is in the words and figures following, to wit: [54]

(Title of Court and Cause.)

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States to the United States of America, Plaintiff and Appellee, and to Wellington D. Rankin, United States District Attorney for the District of Montana, and Arthur P. Acher and Howard A. Johnson, Assistant Attorneys for the United States of America, GREETING:

You, and each of you, are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal filed in the District Court of the United States for the District of

Montana from the District Court of the United States for the District of Montana to the United States Circuit Court of Appeals for the Ninth Circuit, in a suit wherein the Butte, Anaconda & Pacific Railway Company, a corporation, organized and existing under and by virtue of the laws of the State of Montana, is defendant and appellant, and you, the United States of America, are plaintiff and appellee, to show cause, if any there be, why the judgment rendered on the 3d day of February, 1931, *nunc pro tunc* as of December 27, 1930, against said Butte, Anaconda [55] & Pacific Railway Company, a corporation, mentioned in said appeal, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the City of Butte, in the District of Montana, this 13 day of March, 1931.

BOURQUIN,

Judge of the District Court of the United States for the District of Montana. [56]

Service of the within and foregoing citation on appeal acknowledged and a copy thereof received this 13th day of March, 1931.

WELLINGTON D. RANKIN,

United States Attorney for the District of Montana,

HOWARD A. JOHNSON,

Asst. U. S. Attorney,

Attorneys for the United States of America. [57]

Filed March 13, 1931. [58]

THEREAFTER, on the 27th day of March, 1931, the praecipe of the defendant for transcript of record with admission of service thereon was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT OF RECORD TO CLERK OF ABOVE-ENTITLED COURT.

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause, and to incorporate and include in such transcript of record the following, and no other papers or exhibits, to wit:

1. The complaint of the United States of America, plaintiff.

2. The demurrer of the defendant, Butte, Anaconda & Pacific Railway Company, a corporation, to the complaint of the plaintiff.

3. The order of the above-entitled court overruling the demurrer of said defendant to the complaint of said plaintiff dated the 26th day of February, 1930, as entered in the order book of the above-entitled court.

4. The decision of the above-entitled court by written opinion overruling the demurrer of the said defendant to the complaint of the said plaintiff, made and filed on the 26th day of February, 1930.

5. The answer of the said defendant to the complaint of said plaintiff.

6. The demurrer of the said plaintiff to the answer of the said defendant.

7. The order of the above-entitled court overruling the demurrer of said plaintiff to the second defense contained in the answer of said defendant and sustaining the demurrer of said plaintiff to said answer of said defendant in all else, dated the 31st day of May, [59] 1930, as entered in the minutes of the above-entitled court.

8. The decision of the above-entitled court by written opinion overruling the demurrer of said plaintiff to the second defense contained in the answer of said defendant and sustaining the demurrer of said plaintiff to said answer of said defendant in all else, made and filed on the 31st day of May, 1930.

9. The amended answer of the said defendant to the complaint of said plaintiff.

10. The motion for judgment on the pleadings of the said plaintiff.

11. The order of the above-entitled court granting the motion for judgment on the pleadings of the said plaintiff, and ordering judgment entered accordingly, dated the 27th day of December, 1930, as entered in the minutes of the above-entitled court.

12. The decision of the above-entitled court by written opinion determining the said plaintiff is entitled to interest from demand made at the Montana rate rather than that of the District of Columbia made on the 31st day of January, 1931, and filed on the 2d day of February, 1931.

13. The order of the above-entitled court for in-

terest at the Montana rate and that judgment be entered *nunc pro tunc* as of the date the order was made granting plaintiff's motion for judgment on the pleadings dated the 2d day of February, 1931, as entered in the minutes of the above-entitled court.

14. The judgment of the above-entitled court rendered and entered on the 3d day of February, 1931, *nunc pro tunc* as of the 27th day of December, 1930.

15. The assignment of errors of defendant, petitioner and appellant.

16. The petition for allowance of appeal. [60]

17. The order allowing an appeal.

18. The stipulation *in re* supersedeas bond.

19. The bond for costs on appeal.

20. The citation on appeal with admission of service.

21. This praecipe with admission of service thereon.

Said transcript to be prepared and duly certified by you, as required by law, and the rules of the above-entitled court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and that you further state in your certificate, under seal, the cost of said transcript and by whom paid.

Dated this 27th day of March, 1931.

L. O. EVANS,
D. M. KELLY,
WARREN NICHOLS,
JOHN A. GROENEVELD,
Attorneys for Defendant, Petitioner, and Appellant.

Service of the within and foregoing praecipe for transcript of record acknowledged and copy thereof received this 27th day of March, 1931.

WELLINGTON D. RANKIN,
United States Attorney for the District of Montana,
HOWARD A. JOHNSON,
Asst. U. S. Attorney,
Attorneys for the United States of America.

The contents of the transcript of record on appeal as specified in the within and foregoing praecipe is hereby stipulated and agreed to this —— day of March, 1931.

_____,
United States Attorney for the District of Montana,

_____,
Attorneys for the United States of America.

Filed March 27, 1931. [61]

CERTIFICATE OF THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 62 pages, numbered consecutively from one to 62, in-

clusive, is a full, true and correct transcript of the record and proceedings in the within-entitled cause, required to be incorporated in said transcript by praecipe filed, as appears from the original records and files of said court and cause in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of said transcript amount to the sum of Six and 40/100 dollars ($6.40), and that said costs have been paid by the appellant.

WITNESS my hand and seal of the United States District Court for the District of Montana at Butte, Montana, this 6th day of April, 1931.

[Seal] C. R. GARLOW,
Clerk of the United States District Court for the District of Montana.

By L. R. Polglase,
Deputy Clerk. [62]

[Endorsed]: No. 6434. United States Circuit Court of Appeals for the Ninth Circuit. Butte, Anaconda & Pacific Railway Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed April 10, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6434

United States
Circuit Court of Appeals
For the Ninth Circuit

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the District of Montana.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1931 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Monday, the nineteenth day of October in the year of our Lord One Thousand Nine Hundred and Thirty-one.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable WILLIAM P. JAMES, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. D. M. Kelly, counsel for the appellant, and by Mr. Wellington D. Rankin, United States Attorney, counsel for the appellee, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court room thereof, in the City and County of San Francisco, in the State of California, on Monday, the seventh day of November in the year of our Lord One Thousand Nine Hundred and Thirty-two.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the District of Montana.

Before: WILBUR and SAWTELLE, Circuit Judges, and JAMES, District Judge.

JAMES, District Judge:

Appellant is the owner of a railroad which extends from Butte to Anaconda, in the State of Montana, connecting at Butte with the Northern Pacific Railway. It was operated, under control of the Federal Government, from January 1, 1918, to September 27, 1918, on which last mentioned date it was released from control. Thereafter, and from September 28, 1918, to February 29, 1920, it operated under its own management. During the latter period its operating income was $2,079,693.08. Its operating expenses were $1,840,167.95, leaving

a net income of $239,525.13. It claimed from the Government that it was entitled under provisions of the Transportation Act of 1920 to reimbursement for decreased income in the amount of $600,527.35 as for the stated period after it was released from control. The Interstate Commerce Commission, acting on the application of appellant, made its certificate that the railroad company had sustained a deficit in the sum of $487,116.21, which sum in March, 1925, was paid to appellant from the Treasury of the United States. On March 7, 1927, the Commission made its order cancelling the certificate upon which payment of the "deficit" amount had been paid. In August, 1929, the United States brought this suit to recover the amount so paid to appellant for the alleged reason that payment was unauthorized by the law. The defendant answered the complaint and the District Court, upon motion, awarded judgment on the pleadings in favor of the Government. This appeal was then taken.

Appellant, in its answer made to plaintiff's complaint, admitted that it realized a profit through its own management from the operation of its railroad prior to the termination of Federal control, and for the period before stated. It denied that the payment of the money sued for was improperly or illegally made; denied the right of the United States to sue for the recovery of the money; alleged that as it had disbursed the sum in the payment of dividends, expenses of maintenance and operation,

taxes, etc., and had been charged with taxes on the money as being properly possessed by it, the United States was estopped to require repayment.

The Transportation Act, approved February 28, 1920 (41 Stats. page 456), which amended the Interstate Commerce Act, provided (Sec. 204) that the Federal control of the railroads should terminate on March 1, 1920. It contained many provisions for the adjustment of matters growing out of Government administration of the railroads. It determined, among other things (Sec. 204, codified, 49 U. S. C. A. 73) that reimbursement should be made to relinquished roads for "deficits" suffered by the latter in "railway operating income" during the time when the Government control was operative. This for the apparent reason that short lines not operating under the arrangement whereby "just compensation" was rendered to controlled roads, might by reason of the competition of the controlled roads (the latter being subject to Government orders regarding routing and diversion of traffic and wage scales) be unfairly discriminated against. In that connection Section 204, the provisions of which prescribe a complete method for reimbursement of the relinquished lines, declares, first, (a) that the term "carrier" as used in the section means "a carrier by railroad which, during any part of the period of Federal control engaged as a common carrier in general transportation, and competing for traffic, or connected with a railroad under Federal control, and which sustained a deficit

in its railway operating income for that period (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation: * * *." Also, that the "test" period with which the income should be compared, was the three years ending June 30, 1917.

Subdivision (b) refers to computation methods to be used in the accounting. 1st, railway operating income or deficit *for the period of Federal control* is required to be arrived at by a method "similar" to that specified in Section 209 (40 U. S. C. A. 77). The latter section contains provisions covering the guarantee period for six months from and after March 1, 1920, application of which is not involved here except for the purposes indicated above. 2nd, that the method for computing railroad operating income or deficit *for the test period* shall be that described in Section 1 of the Control Act (40 Stats. 451). These references in subdivision (b) furnish the guide as to the proper items to be considered in casting totals in operating income or deficit during the respective periods. Particular calculations are then to be made in respect of arriving at the credit to be given the carrier on account of deficit in operating income suffered during the control period. The remaining provisions of Section 204 are now quoted in full.

"(c) *Ascertainment of amounts of railway operating income and deficits therein; test period return.* As soon as practicable the commission shall ascertain for every carrier, for

every month of the period of Federal control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if any (hereinafter called 'Federal control return'), and the average of its deficit in railway operating income, if any, and of its railway operating income, if any, for the three corresponding months of the test period taken together (hereinafter called 'test period return'): *Provided,* That 'test period return,' in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during the test period taken together, during which the carrier operated its railroad or system of transportation.

(d) *Sums to be credited to carrier.* For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, or (2) the difference between its test period return, if an income, and its Federal control return, if a smaller income,

or (3) the sum of its Federal control return, if a deficit, plus its test period return, if an income. The sum of such amounts shall be credited to the carrier.

(e) *Sums to be credited to United States.* For every such month the commission shall then ascertain (1) the difference between the carrier's Federal control return, if an income, and its test period return, if a smaller income, or (2) the difference between its test period return, if a deficit, and its Federal control return, if a smaller deficit, or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit. The sum of such amounts shall be credited to the United States.

(f) *Payments of difference to carrier.* If the sum of the amounts so credited to the carrier under subdivision (d) of this section exceeds the sum of the amounts so credited to the United States under subdivision (e) of this section, the difference shall be payable to the carrier. In the case of a carrier which operated its railroad or system of transportation for less than a year during, or for none of, the test period, the foregoing computations shall not be used, but there shall be payable to such carrier its deficit in railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation.

(g) *Certification of amounts payable to carriers; warrants and payment thereof.* The commission shall promptly certify to the Secretary of the Treasury the several amounts payable to carriers under paragraph (f). The Secretary of the Treasury is authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto."

Shortly after this act became effective, claims were made by certain released short line roads for reimbursement under the provisions of the section. The Interstate Commerce Commission on the earlier applications determined that reimbursement should be made wherever it is shown that the relinquished lines had suffered a decrease in income during the Federal control period, as compared with the test period. In other words, that whether the carrier had operated at a loss during the control period was not a determining factor. Claims were allowed and paid under that construction, although several of the commissioners dissented. (66 I. C. C. 765.) Later, claims for many millions of dollars were filed with the Commission to recover for decreased income, and, upon a reconsideration of the question, the Commission reversed its former holding and declared that in order to have the benefits of Section 204 of the Transportation Act the carrier concerned was required to show that it had operated at a loss during the control period. (99 I. C. C. 724.)

It seems to be admitted that the terms of subdivision (a) of Section 204, taken alone, entitles a carrier to compensation only when it operated at a loss during the control period. It is argued, however, that this construction is affected by the provisions of subdivisions (c), (d), (e) and (f) which prescribe the method by which the deficit is to be ascertained. This argument is without force when it is considered that subdivision (a) explicitly defines the carrier as to whose income the subsequent provisions are to be applied; the latter provisions are necessarily subordinate to the class definition contained in subdivision (a). It is true enough that under the method prescribed in (c), (d), (e) and (f) a railroad which had not operated at a loss but had had a continuous (month by month) net profit during Federal control, against a greater test period profit, would be shown to have a credit in its favor, which, by subdivision (f) would be payable to the carrier; for the reason that provisions (d) and (e) referring to comparative monthly computations that are to be made, include calculations as to "the difference between its test period return, if an income, and its Federal control return, if a smaller income." But as one of the commissioners well stated in his dissenting opinion in the earlier decision of the Commission, "This method of monthly calculation was undoubtedly devised for the reason that there was a seasonable variation in traffic and a fair result would be obtained by comparing operating income by separate months with

corresponding income during the test period." The construction to be given to the section as a whole seems not to be doubtful. The carrier, under subdivision (a), first determines whether it has suffered a loss in its operating income as a whole, for the period of Federal control and while it was not under Federal control. If it has suffered such a loss, then the amount of its reimbursement is to be worked out by means of the calculations required to be made under (c), (d), (e) and (f). If it has not suffered such a loss, it has no right to reimbursement. This construction appears to be in harmony with the purpose of Congress. If the construction that a diminution in income compared with the test period is the criterion, then a discrimination would be worked against carriers of the same class which operated for less than a year during the test period; as to which, by subdivision (f), it is provided that the computations described in subdivision (d) and (e) shall not be applied, but that there shall be payable to such carriers "deficit in railway operating income (as a whole) for the period of Federal control during which it operated its own railroad or system of transportation." There is no reason or consistency in construing the reimbursement provision as to the latter roads to limit the right to payment to actual deficit during Federal control, and allow other short lines which operated a year or more during the test period to full reimbursement for depreciation in income regardless of whether any loss or "deficit" was suf-

fered. The argument that a short line having a deficit in operating income under its own operation during Federal control is given unfair advantage over roads not suffering such deficit but producing but a small income, is beside the question, for the right of Congress to define the class of carrier entitled to benefits cannot be disputed. There is no real contention made that where the term "deficit" is used in the subdivisions which prescribe methods of computation, including those contained in the guaranty provisions of Section 209 of the Act (49 U. S. C. A. 77), "deficit" means anything other than an excess of outlay over receipts.

The appellant contends that even though the Commission misconstrued the Act in allowing to the railroad the sum of money which the government seeks to recover, that its act is not subject to review by the Courts as the Commission had jurisdiction to determine the matter finally; that it acted judicially and that its first order must stand. This argument would be difficult to answer were the case one where the railroad had presented itself showing a deficit in its operating returns as compared with the test period and the dispute was as to the particular sum due to it. But, under the admitted facts, its case was not one which the Commission was authorized to consider at all. It has been clearly settled that the Courts have full right when appealed to, to determine by independent hearing, whether agencies of the government to which have been committed duties involving the exercise of

administrative functions, or powers of a judicial nature, have exercised their powers with respect to the particular persons or subject matter designated by Congress. If the power is lacking the act is void. This subject in general was discussed at length in the recent decisions of the Supreme Court: Crowell v. Benson, 288 U. S. 22. See also: Interstate Commerce Commission v. Ill. Cent. R. R., 215 U. S. 452; Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433; Interstate Commerce Commission v. Union Pac. R. R., 222 U. S. 541; Tagg Bros. & Moorehead v. United States, 280 U. S. 420 at page 442. The added contention of appellant that the settlement made was one of compromise does not make a different case because the railroad company was not entitled to any amount under the facts as admitted.

The United States may demand repayment of money paid out by its officers or agents where no authority of law exists for such payment. Persons so receiving public funds are charged with knowledge that they have taken that to which they have not the right, and are bound, upon demand, to return it. Decisions determining the question differently where private parties are wholly concerned, are not pertinent. No estoppel as for voluntary payment can be claimed to defeat the suit of the government: Wisconsin Central Ry. v. United States, 164 U. S. 190. Cited with approval in Allen v. United States, 204 U. S. 581 and Grand Trunk v. Western Ry. Co., 252 U. S. 112, Sutton v. United

States, 252 U. S. 576. No conditions are present like those where a person has contracted with a government agency and received payment in return for a consideration actually rendered by him (as the performance of work) and it has later been discovered that the contract was not legally authorized. Here the railroad company returned nothing to the government in exchange for the money received. Plaintiff had only to show that the money was improperly paid as described. What use appellant thereafter made of it is immaterial. No estoppel can be claimed because it disbursed the fund and was taxed because of the possession and claimed ownership of it. The decisions cited affirming the right of the United States to recover public money so paid out without authority of law, as a corollary must imply that there is no estoppel under conditions such as this case presents.

Appellant makes the further complaint that the action of the Court in adjudging that plaintiff was entitled to interest on the principal sum claimed, at the legal rate fixed by the law of the State of Montana where the suit was tried, and from the date of the demand made for repayment, was improper. It is a rule long established that where a person refuses to return money due to another, a judgment thereafter obtained for the recovery thereof will include interest from the date of the demand. Interest is generally allowable for "delay in discharging a duty, * * * And in default on a contract to pay money even without express legis-

lation so directing * * * the rate must be reasonable and conform to the custom which obtains in the community." Billings v. United States, 232 U. S. 261, which cites and quotes from Young v. Godbe, 15 Wall. 562. "Both in law and in equity interest is alowed on money due." Miller v. Robertson, 266 U. S. 243 at 258. See also: Oklahoma State Bank v. Galion Iron Works & Mfg. Co., 4 Fed. (2nd) 337, C. C. A. 8; Kishi v. Humble Oil & Ref. Co., 10 Fed. (2nd) 356, C. C. A. 5. Where interest is allowed it is at the legal rate fixed by the law of the forum. Mather v. Stakely, 217 Fed. 764, C. C. A. 1. In the case last cited the suit, tried in the Massachusetts district, was brought on covenants on a warranty deed on lands in Florida. The District Court allowed interest at eight per cent per annum, being the legal rate in Florida, whereas the rate fixed in Massachusetts was six per cent. The Circuit Court of Appeals held that the District Court erred and that the Massachusetts rate governed. See also: The Leonie O. Louise, 4 Fed. (2nd) 699, C. C. A. 5. Decisions of District Judges to the same effect in cases in which the United States was the plaintiff, are: United States v. Pan-American Petroleum Company, 24 Fed. (2nd) 206; United States v. Skinner & Eddy, 28 Fed. (2nd) 373; Jones Company v. Canadian Ry. Co., 14 Fed. (2nd) 852.

No error is found entitling appellant to a reversal of the judgment.

Affirmed.

[Endorsed]: Opinion. Filed November 7, 1932. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6434

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT.

UPON APPEAL from the District Court of the United States for the District of Montana.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Montana, and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[Endorsed]: Judgment. Filed and entered November 7, 1932. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the sixteenth day of January in the year of our Lord One Thousand Nine Hundred and Thirty-three.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANK F. NORCROSS, District Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant, filed December 6, 1932, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

APPLICATION FOR STAY OF MANDATE.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now Butte, Anaconda & Pacific Railway Company, a corporation, appellant above named, and shows and makes known to the Court:

That the decision and opinion in the above entitled cause was rendered and filed herein November 7, 1932, and

That on December 6, 1932, appellant has filed herein its petition for a rehearing in said cause and that in the event of a denial of the petition for rehearing, appellant desires to remove the cause to the Supreme Court of the United States on an application for writ of certiorari, and

That in the event of a denial of the petition for rehearing, appellant will file its petition for such writ of certiorari with the Clerk of the Supreme Court of the United States.

Appellant therefore respectfully petitions this Court that in the event of a denial of its petition for rehearing that a stay of the issuance of the mandate of this Court be ordered for a period of sixty (60) days from such date in order that appellant may have sufficient time within which to prepare the record and its petition for a writ of certiorari and file the same with the Clerk of the Supreme Court of the United States.

In the event that such stay be granted, appellant will file its application for said writ and will request the Clerk of the Supreme Court of the United States to advise the Clerk of this Court of the filing of said petition for writ of certiorari so

that the mandate of this Court may be stayed pending the termination of said petition.

Respectfuly submitted,

D. M. KELLY,
WARREN NICHOLS,
JOHN A. GROENEVELD,
Attorneys for Appellant.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. D. M. Kelly, counsel for the appellant, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including March 18, 1933; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated, San Francisco, California,
January 16, 1933.

[Endorsed]: Filed January 16, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-eight (98) pages, numbered from and including 1 to and including 98, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 26th day of January, A. D. 1933.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 17, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3304)